REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

ENVIROMMENT & LAND COURT

CIVIL APPEAL NO 73 OF 2012

KIONYO TEA CO. LTD.....1ST APPELLANT

WILLIAM MBAABU MANYARA.....2ND APPELANT

SAMUEL MURITHI.....3RD APPELLANT

KIMATHI NKABU.....4TH APPELLANT

ANTONY MUTHUGUCHI.....5TH APPELLANT

VERSUS

JAPHET M'MBURUGU.....RESPONDENT

J U D G M E N T

1. This is an appeal against the judgment /decree in Nkubu PMCC No. 42 of 2006 delivered/ issued on 18th July, 2012 by C.N. NDUBI (SRM) (MRS).

The grounds set forth in the Memorandum of Appeal are as follows:-

i. THAT the Learned trial Magistrate erred in law and fact by finding the appellants liable for the de-barking of trees growing on a public road, which trees were not on the Respondent's land LR. NO. ABOGETA/U-CHURE/1998 and thus, the respondent had no legal basis to claim ownership and compensation for trees growing on a public road.

ii. THAT the learned trial Magistrate erred in law and fact by arriving at a conclusion that the Appellant had before the filling of the suit intimated the desire to settle the dispute,yet Pexh4 , a letter dated 24th March 2005 was issued by KTDA Ltd, which is not a party to the suit and which company is a limited liability company, which cannot purport to make settlement on behalf of the Appellant and Pexh 4 should never have been construed as an intimation by the Appellants to settle the Respondent's claim.

iii.THAT the Learned trial Magistrate erred in Law and fact by failing to appreciate that the respondent had no proprietary or legal ownership of trees growing on a public land, despite the fact that PW 5, who is a Government Surveyor rightly found that the trees in disputed were growing on public road and that such claim of compensation constituted an illegality, which the trial court perpetuated by awarding the Respondent compensation to a tune of Kshs. 331,589.30.

iv. THAT the Learned trial Magistrate erred in law in invoking the constitution to compensate the Respondent, yet the very said constitution prohibits a person from benefiting economically from a property he does not own and property illegally acquired specifically, planting of trees on a public road , which action is prohibited by law.

v. THAT the leaned trial Magistrate analysed the evidence tendered in Court in a skewed manner, by completely ignoring the defence evidence, which evidence was opinion evidence by an expert namely a licensed surveyor.

vi. The Judgment /decree is against the law and facts presented before the trial Court.

Before this Court Appellant prays;

(a) THAT the judgment /decree of the trial in NKUBU PMCC NO. 42 of 2006 be set aside and the Respondent's suit therein be dismissed with costs to the Appellants.

(b) THAT the cost of the appeal be awarded to the Appellants.

2. directions were given on 19/9/2015 for the appeal to be disposed off by way of written submissions. Both sides have complied.

3. <u>APPELLANT'S CASE.</u>

Appellant contends that the trees which were allegedly de-barked were not on Respondents parcel of land no. ABOGETA/ U- CHURE/1998. Further the appellant contends that the trees were on a road reserve hence article 40 (2) does not accord the Respondent protection. Appellant states that a person should not be allowed to benefit from their misdeeds.

It is also submitted that a conclusion should not have been made to lead to construe that Appellant had been willing to settle the matter at any one time .

In support of its case , the appellant has submitted the following authorities;

i. Sonia Kwamboka Rusugu vs. Sandai Wood Hotel & Resort Ltd and others, Nairobi High Court Petition No. 155/11.

ii. Isaac Gathunju Wanjohi & Another vs. Attorney General & 6 others ,Petition No. 154 of 2011.

iii. Juliet Karisa Vs. Joseph Barawa & Another Civil Appeal No. 108 of 1988,

iv. Multiple Handlers East Africa Limited Vs. Attorney General & 10 others.

4. <u>RESPONDENT'S CASE.</u>

Respondent has submitted that the bone of contention is the land where the de-barked trees were located. According to the Respondent he had planted the trees many years ago on his land and that the appellants by laws had only made reference to new trees.

In his submissions, Respondent has advanced a case of compulsory acquisition by the 1st appellant who in turn had given instructions to the rest of the appellants to cut the trees. Respondent submits that the appellant did not follow the law in acquiring the road reserve.

It is also submitted that Kiongo Tea Factory is a subsidiary company of Kenya Tea Development Agency who have the legal capacity to make legal negotiations and settlements on behalf of the appellant.

Respondent has cited the following authorities to buttress his averments.

i. Commissioner of Lands vs. Coastal Aquaculture Ltd KLR (L&E) 264.

ii. Patrick Musimba Vs. National Land Commission & 4 others [2016]e KLR.

iii. In Shalein Masood Mughal Vs. Attorney General & Others [2014] e KLR.

iv. Susan Waithera & 4 Others Vs. Town Clerk, Nairobi City Council & 2 Others [2011]e KLR.

5. **DETERMINATION**

The court will deal with grounds no. 1, 3 and 4 at the same time in view of the fact that the issue at hand is **whether the Respondent had a rightful claim of ownership of the trees and by extension compensation of the trees which were debarked**. The evidence of PW5 a surveyor before the lower court was that he visited the scene with a map. He had established that the road on the map was 10 meters but on the ground ,it was 6 meters, hence it was less by 4 metres. He further stated that the trees were on a public road.

DWI another surveyor had testified that on the map, the road was 9 meters but on the ground the road was measuring 6 metres. He further stated that the trees in question were on the road reserve (inside the road by 10 feet).

The evidence of the two surveyors is almost similar. The facts emerging are that the trees were on a road reserve. That being the case should the plaintiff be entitled to compensation?.

6. The Respondent had told the court that he planted the trees in 1992. The trees were mature. This evidence is corroborated by PW4 who had assessed the age of the trees to be about 20 years old. It follows that the trees were not newly planted. The trees had been there for years. While assessing and taking measurements at the scene, DWI had stated that;

> ***"I surveyed the boundary of four parcels No.1998, parcel neighboring were 451,2387 and 734 on both sides of No. 1998 When I did all the measurements the live fence along the road on all these parcels on the ground there was a road measuring 6 meters……"***

7. From that evidence of DW1 ,it is apparent that the encroachment on the road reserve was on a continuous stretch along the neighborhood of Respondent's land. That being the case it is essential to establish as to when the road was designated as a road reserve. The approach to this issue by the trial court was captured in the body of the judgment as follows:-

> ***" the issue of whether or not the access road has encroached on to plaintiffs land has been raised. The defendants here are not a government agency They are ordinarily involved in the business of buying and selling tea produced for and on behalf of farmers registered with them. I am not aware that part of their mandate deals with management of road reserves although I am aware that they maintain the feeder roads along the area where they buy their tea from the farmers."***

8. This is a situation where the encroachment on the road reserve along the land parcel of Respondent and his neighbors was not noticeable until the time the measurements were taken by PW5 and DWI. Their evidence does also not indicate when the map came to be or when the road reserve was designated as such. That being the case it was proper for the trial court to make a finding regarding the mandate of the appellant.

9. Cases of encroachment on public land are in plenty but correction and rectification of errors ,irregularities and illegalities is not a preserve of just any one and every one. Action has to be taken in an orderly manner by entities who have the mandate to carry out such tasks.

10. In so far as it was on record that Respondent is the one who had planted the trees , and that the trees had been there for a very long time , that Respondent had not been given a notice to clear the trees ,and that the actual extent of the road reserve was revealed only during the trial, then I find that the trial magistrate had arrived at a correct decision. The appeal therefore fails on ground 1, 3 and 4.

11. I now come to ground no. 2; whether the magistrate erred in arriving at a conclusion that the appellant had intimated the desire to settle the suit. The trial magistrate in the body of the judgment had commented.

> ***"the defendants had earlier on before filing the suit intimated the desire to settle the dispute. why then would they now call the area along which the trees are planted by the plaintiff a road reserve?"***

I have perused the record of the lower court and no where in the proceedings has the issue of settlement been captured. I find that the comment was uncalled for . However there is nothing to suggest that the final finding of the court was based on this comment. On this ground appeal fails.

12. The final ground to consider is No. 5. Did the Magistrate ignore defence evidence.? The Magistrate had made a finding that the appellants were not denying that they de-barked the trees, but that the trees were on a road reserve. The Magistrate had gone ahead to analyze the issue of the access road and its encroachment, before arriving at a final conclusion. The trial Court indeed considered the defence evidence. I therefore find no merits in ground No. 5.

13. In Conclusion, I find that the entire appeal has no merits and the same is dismissed with costs to Respondent.

DELIVERED IN OPEN COURT AT MERU THIS 26TH DAY OF APRIL, 2017 IN THE PRESENCE OF:-

C:A Janet

Japhet M'Mburugu -Respondent

HON. L.N. MBUGUA

JUDGE